SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

784

CA 22-01665

PRESENT: SMITH, J.P., LINDLEY, BANNISTER, AND MONTOUR, JJ.

IN THE MATTER OF COR VAN RENSSELAER STREET COMPANY III, INC., PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE URBAN DEVELOPMENT CORPORATION, DOING BUSINESS AS EMPIRE STATE DEVELOPMENT, RESPONDENT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (JAMES M. SPECYAL OF COUNSEL), FOR RESPONDENT-APPELLANT.

COSTELLO COONEY & FEARON, PLLC, SYRACUSE (DANIEL R. ROSE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered September 12, 2022, in a proceeding pursuant to CPLR article 78. The judgment granted the amended petition in part and directed respondent to approve certain funding to petitioner.

It is hereby ORDERED that the judgment so appealed from is unanimously vacated and the order entered May 13, 2020 insofar as appealed from is reversed on the law without costs.

Memorandum: Petitioner, a developer, commenced this CPLR article 78 proceeding seeking several items of relief, including an order compelling respondent, a public benefit corporation, to present to its Board of Directors for approval an incentive proposal offered to petitioner that would grant funding for a development project and compelling the Board of Directors to approve the incentive proposal. By order entered May 13, 2020, Supreme Court, inter alia, granted petitioner mandamus relief insofar as respondent was compelled to submit the incentive proposal to the Board of Directors for review and denied without prejudice as unripe for determination petitioner's request for mandamus relief compelling the Board of Directors to approve the incentive proposal. We subsequently dismissed respondent's appeal from that nonfinal order (*Matter of Cor Van Rensselaer St. Co., III, Inc. v New York State Urban Dev. Corp.*, 197 AD3d 976, 977 [4th Dept 2021]). Thereafter, in compliance with the nonfinal order, respondent submitted the incentive proposal for review by the Board of Directors, which then denied funding under the incentive proposal. Petitioner filed an amended petition seeking, inter alia, an order compelling respondent to approve the incentive

proposal on the ground that such approval was a ministerial act over which respondent had no discretion or, in the alternative, annulling the determination to deny funding under the incentive proposal as arbitrary and capricious. Respondent now appeals from an "order" granting the amended petition insofar as it sought to compel respondent to approve the funding consistent with the incentive proposal.

Preliminarily, we conclude that the paper from which respondent appeals constitutes a final judgment (*see Burke v Crosson*, 85 NY2d 10, 15 [1995]; *Matter of Monroe County Fedn. of Social Workers, IUE-CWA Local 381 v Stander*, 169 AD3d 1479, 1480 [4th Dept 2019]), which brings up for review the nonfinal order in this case (*see* CPLR 5501 [a] [1]; *see also Baum v Javen Constr. Co., Inc.*, 195 AD3d 1378, 1378-1379 [4th Dept 2021]). As limited by its brief, respondent contends with respect to the nonfinal order that the court erred in compelling it to present the incentive proposal to the Board of Directors for review because the proceeding insofar as it sought that relief was untimely. We agree.

"[W]here, as here, the proceeding is in the nature of mandamus to compel, it 'must be commenced within four months after refusal by respondent, upon demand of petitioner, to perform its duty' " (*Matter of Granto v City of Niagara Falls*, 148 AD3d 1694, 1695 [4th Dept 2017]; *see* CPLR 217 [1]; *Matter of Densmore v Altmar-Parish-Williamstown Cent. School Dist.*, 265 AD2d 838, 839 [4th Dept 1999], *lv denied* 94 NY2d 758 [2000]). " '[A] petitioner[, however,] may not delay in making a demand in order to indefinitely postpone the time within which to institute the proceeding. The petitioner must make his or her demand within a reasonable time after the right to make it occurs, or after the petitioner knows or should know of the facts which give him or her a clear right to relief, or else, the petitioner's claim can be barred by the doctrine of laches' " (*Matter of Speis v Penfield Cent. Schs.*, 114 AD3d 1181, 1182 [4th Dept 2014]). "The term laches, as used in connection with the requirement of the making of a prompt demand in mandamus proceedings, refers solely to the unexcused lapse of time" and "does not refer to the equitable doctrine of laches" (*Matter of Devens v Gokey*, 12 AD2d 135, 137 [4th Dept 1961], *affd* 10 NY2d 898 [1961]). Inasmuch as "[t]he problem . . . is one of the [s]tatute of [l]imitations[,] . . . it is immaterial whether or not the delay cause[s] any prejudice to the respondent" (*id.*; *see Matter of Norton v City of Hornell*, 115 AD3d 1232, 1233 [4th Dept 2014], *lv denied* 23 NY3d 907 [2014]; *Matter of Thomas v Stone*, 284 AD2d 627, 628 [3d Dept 2001], *appeal dismissed* 96 NY2d 935 [2001], *lv denied* 97 NY2d 608 [2002], *cert denied* 536 US 960 [2002]; *Matter of Curtis v Board of Educ. of Lafayette Cent. School Dist.*, 107 AD2d 445, 448 [4th Dept 1985]; *see also Matter of Sheerin v New York Fire Dept. Arts. 1 & 1B Pension Funds*, 46 NY2d 488, 495-496 [1979], *rearg denied* 46 NY2d 1076 [1979]). "[T]he four-month limitations period of CPLR article 78 proceedings has been 'treat[ed] . . . as a measure of permissible delay in the making of the demand' " (*Norton*, 115 AD3d at 1233; *see Granto*, 148 AD3d at 1696).

Here, the record establishes that funding under the incentive proposal offered to petitioner was contingent upon, among other things, approval by the Board of Directors and that respondent reserved the right to reconsider the incentive proposal in the event of a material change in circumstances. The incentive proposal was scheduled for consideration by the Board of Directors at its July 2016 meeting. However, after respondent learned that principals of petitioner were the subject of a pending criminal investigation by federal prosecutors, respondent's project manager informed petitioner approximately one week prior to the scheduled meeting that the incentive proposal would not be presented to the Board of Directors at that meeting as planned. Although the project manager promised to provide more details as they became available and petitioner subsequently asked whether the incentive proposal would be considered by the Board of Directors at its August 2016 meeting, the project manager provided no further response. Petitioner was thus aware at least as of August 2016 that the incentive proposal would not be presented to the Board of Directors for consideration. Petitioner's demand, therefore, should have been made no later than December 2016, but petitioner instead proceeded to complete the project and did not make its demand that the incentive proposal be considered by the Board of Directors until March and April 2019, which was well beyond four months after petitioner knew or should have known of the facts that provided it a clear right to relief (*see Granto*, 148 AD3d at 1696; *Densmore*, 265 AD2d at 839).

Contrary to petitioner's contention that it had a reasonable excuse for the delay in making the demand, we conclude that the alleged conversation between petitioner's Chief Executive Officer (CEO) and respondent's representative that occurred in January 2017, which itself was beyond the time that petitioner should have made its demand, simply reaffirmed that of which petitioner was already aware: respondent was not submitting the incentive proposal to the Board of Directors for consideration (*see Granto*, 148 AD3d at 1696). As further evinced by the affidavit of petitioner's CEO, there was no uncertainty that consideration by the Board of Directors was the next procedural step required to obtain funding under the incentive proposal (*cf. Matter of Chevron U.S.A. Inc. v Commissioner of Envtl. Conservation*, 86 AD3d 838, 841 [3d Dept 2011]). We also agree with respondent that the court, in rejecting the laches defense, erroneously relied on the April 2020 deadline in the incentive proposal. That was the deadline for requesting the disbursement of funds to which petitioner would have been entitled under the incentive proposal, but approval by the Board of Directors was a prerequisite to establish entitlement to any funds, and petitioner, for the reasons discussed, unreasonably delayed in demanding that respondent submit the incentive proposal for consideration by the Board of Directors (*see Granto*, 148 AD3d at 1696; *cf. Speis*, 114 AD3d at 1183).

Even assuming, arguendo, that laches did not bar the mandamus relief granted in the nonfinal order, we further agree with respondent that the court erred in compelling respondent in the judgment to approve the incentive proposal on the ground that such approval was a ministerial act over which respondent had no discretion. A writ of

mandamus to compel "is an extraordinary remedy that is available only in limited circumstances" (*Alliance to End Chickens as Kaporos v New York City Police Dept.*, 32 NY3d 1091, 1093 [2018], *cert denied* — US —, 139 S Ct 2651 [2019], *reh denied* — US —, 140 S Ct 18 [2019] [internal quotation marks omitted]). "Such remedy will lie 'only to enforce a clear legal right where the public [entity or] offic[er] has failed to perform a duty enjoined by law' " (*id.*, quoting *New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184 [2005], *rearg denied* 4 NY3d 882 [2005]; *see* CPLR 7803 [1]). Thus, the writ "is available to compel a governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion" (*Matter of Brusco v Braun*, 84 NY2d 674, 679 [1994]; *see Alliance to End Chickens as Kaporos*, 32 NY3d at 1093; *Matter of Gimprich v Board of Educ. of City of N.Y.*, 306 NY 401, 406 [1954]). "A discretionary act 'involve[s] the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result' " (*New York Civ. Liberties Union*, 4 NY3d at 184, quoting *Tango v Tulevech*, 61 NY2d 34, 41 [1983]).

Here, we conclude that mandamus to compel does not lie because the Board of Directors retained discretion to approve or disapprove the incentive proposal (*see Matter of Citywide Factors, Inc. v New York City School Constr. Auth.*, 228 AD2d 499, 500 [2d Dept 1996]). As noted, the incentive proposal stated that funding thereunder was subject to approval by the Board of Directors and that respondent reserved the right to reconsider the incentive proposal in the event of a material change in circumstances (*see Matter of Hamptons Hosp. & Med. Ctr. v Moore*, 52 NY2d 88, 93 [1981]; *cf. Matter of County of Wyoming v Division of Criminal Justice Servs. of State of N.Y.*, 83 AD2d 25, 27 [4th Dept 1981]). The Board of Directors exercised that discretion in this case by denying funding under the incentive proposal in accordance with the recommendation of respondent's staff (*see generally* McKinney's Uncons Laws of NY § 6254 [10] [Urban Development Corporation Act (UDCA) § 4 (10), as added by L 1968, ch 174, § 1, as amended]), which was based on, among other things, the intervening federal criminal convictions of two of petitioner's principals and the subsequent transfer of those principals' ownership stake in petitioner to trusts controlled by their respective spouses (*see Citywide Factors, Inc.*, 228 AD2d at 499-500). Contrary to the court's determination and petitioner's assertion, the discretionary nature of the Board of Directors' consideration of incentive proposals is not altered by the evidence that the Board of Directors had a past practice of approving incentive proposals as recommended by respondent's staff because the Board of Directors "was under no *obligation* to merely 'rubber stamp' " the incentive proposals (*Matter of Hussain v Lynch*, 215 AD3d 121, 127 [3d Dept 2023] [emphasis added]; *see Hamptons Hosp. & Med. Ctr.*, 52 NY2d at 96-97). Inasmuch as the Board of the Directors' approval of incentive proposals " 'involve[s] the exercise of reasoned judgment which could typically produce different acceptable results' " rather than " 'direct adherence to a governing rule or standard with a compulsory result,' " we conclude

that such approval "cannot be compelled by writ of mandamus" (*New York Civ. Liberties Union*, 4 NY3d at 184).

We further agree with respondent that the court erred in concluding, in the alternative, that the determination to deny funding under the incentive proposal should be annulled as arbitrary and capricious. On this record, it cannot be said that respondent's action was "taken without sound basis in reason or regard to the facts" (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]).

Inasmuch as the court should not have compelled respondent to present the incentive proposal to the Board of Directors for review in the first instance, we reverse the nonfinal order insofar as appealed from and vacate the judgment.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court